ORIGINAL

No. 89-6985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under Batson v. Kentucky, 476 U.S. 76 (1986), the government's exercise of peremptory challenges against black and Hispanic jurors required reversal of petitioner's conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. C439-C436) is reported at 891 F.2d 439.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1989. A petition for rehearing was denied on February 20, 1990. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to commit extortion, and the substantive offense of extortion, in violation of 18 U.S.C. 1951. He was sentenced to three years' imprisonment and four years' probation. The court of appeals affirmed. Pet. App. C439-C436.

1. The evidence at trial showed that petitioner was the president of a business that promoted the hiring of minority employees by New York construction companies. In 1985, petitioner and an accomplice extorted money from Frank DePalma, the owner of a construction business. DePalma began to cooperate with the authorities and recorded subsequent conversations with petitioner and his accomplice. Those recorded conversations revealed that DePalma made payments to petitioner by hiring a "no-show" employee referred by petitioner's accomplice. Gov't C.A. Br. 2-6.

Petitioner, as described by his counsel, is half black and half Puerto Rican. During jury selection, the government had available six peremptory challenges in the selection of the petit jury and one in the selection of alternate jurors. In the selection of the petit jury, the prosecutor struck two black jurors, one Hispanic juror, and two white jurors; the prosecutor also waived one of his peremptory challenges. In the selection of alternate jurors, the prosecutor exercised

one strike against a black juror. Pet. App. C440; V Tr. 127.

At the close of jury selection, petitioner requested that the magistrate require the prosecutor to justify the use of his strikes against the minority veniremen. The prosecutor objected, indicating that petitioner had not made a sufficient showing to require him to explain his use of peremptory strikes. Without making an express finding on that issue, the magistrate indicated that he would give the prosecutor an opportunity to put on the record his explanations of the peremptory strikes, and the prosecutor did so. Pet. App. C440-C441.

The prosecutor explained that juror Clark, a black man, was struck because he was 23 years old, single, and living at home; his lack of experience made him an inappropriate candidate for foreman, which the prosecutor assumed he would become because he was juror number one. Juror Garcia, an Hispanic man, was struck because of his lack of fluency in English, which prompted concerns that he might not understand the tape recordings to be introduced in evidence. Juror Callier, a black woman, was struck because she had children about the same age as petitioner; the prosecutor thought she might be unduly sympathetic to petitioner for that reason. Juror Brown, a black woman, was struck during the alternate round because she was a social worker, an occupation that the prosecutor believed might make her especially sympathetic to the defense in a criminal case. Pet. App. C441; V Tr. 136,

140-141. 1/

After hearing those explanations, the magistrate rejected petitioner's claim that the prosecutor had discriminated in his use of peremptory challenges. The magistrate concluded that "there was not an intent to make or deprivation of a right to a jury trial by peers." The jury that heard petitioner's case included one black and two Hispanic jurors. Pet. App. C3; V Tr. 151-153.

2. The court of appeals affirmed, rejecting petitioner's contention under Batson v. Kentucky, 476 U.S. 79 (1986), that his conviction should be reversed based on the prosecutor's use of peremptory strikes. The government argued that petitioner had failed to establish a prima facie case of racial discrimination in the prosecutor's use of his peremptory challenges, and that the prosecutor provided satisfactory race-neutral reasons for his strikes. Gov't C.A. Br. 11-18. Without reaching those issues, the court of appeals concluded that relief was not warranted in this case because the racial composition of the jury that ultimately heard petitioner's case approximated a fair cross-section of the racial composition of the community from which the venire was drawn. Pet. App. C443-C445. In so holding, the court

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1/ The prosecutor also noted that he had used two challenges to remove white jurors and had waived his opportunity to exercise a strike on the fifth round of jury selection, even though at that time there was a black person on the jury panel. V. Tr. 133-134. The record reflects that the defense exercised a peremptory challenge against one of the black jurors on the panel. Id. at 138.

relied on Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989), which had determined that in a challenge to the prosecutor's use of peremptory strikes based on the Sixth Amendment, a conviction should not be reversed in the absence of underrepresentation of minority jurors. 2/ Although recognizing that the Roman analysis might be more suitable for Sixth Amendment claims than for the equal protection claim recognized by this Court in Batson, the court found such a distinction unwarranted in the context of reviewing the prosecutor's use of peremptory challenges. Pet. App. C445.

ARGUMENT

Petitioner challenges the court of appeals' holding that his claim under Batson, even if meritorious, did not entitle him to relief because the jury, as empaneled, fairly represented the minority groups allegedly challenged by the prosecutor on impermissible racial grounds. We agree with petitioner that the rationale on which the court below relied in affirming his conviction is inconsistent with the general approach to the issue of racial discrimination in the exercise of peremptory challenges that this Court employed in Batson. For the reasons set forth below, however, we do not agree that the judgment of the court of appeals in this case

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2/ Both this case and Roman were decided before this Court held in Holland v. Illinois, 110 S. Ct. 803 (1990), that the Sixth Amendment is not violated by the use of peremptory strikes to exclude minority jurors.

warrants review by this Court.

1. In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held, in a case involving a black defendant, that a prosecutor's use of peremptory challenges to strike black jurors on racial grounds violates the Equal Protection Clause. To establish such a violation, the defendant must show a prima facie case of purposeful discrimination in the selection of the petit jury. If the defendant makes that showing, the burden shifts to the prosecutor to come forward with a neutral explanation for the use of his challenges. That explanation, however, need not rise to the level of justifying the exercise of a challenge for cause. The trial court must then make a finding whether the prosecutor intentionally discriminated on the basis of race. Appellate courts must give "great deference" to the trial court's finding on that issue. 476 U.S. at 94-98 & n.12.

As an initial matter, petitioner did not make the type of factual showing that would establish a prima facie case of intentional discrimination. Although the magistrate did not expressly rule on that issue, his comment that "there is no pattern" of strikes against minorities, V Tr. 153, taken in context, appears to reflect his view that petitioner did not demonstrate threshold facts giving rise to a prima facie case. Indeed, the prosecutor did not engage in a pattern of removing minority jurors; rather, the prosecutor exercised his strikes in the first four rounds against a black, a

white, an Hispanic, and a black; in the fifth round, the prosecutor waived his right to challenge despite the presence of minority jurors on the panel, and in the sixth round, the prosecutor struck a white. In the alternate round, the prosecutor struck a black. The final petit jury included three minority jurors.

That sequence of events does not suggest that the prosecutor was making an effort to remove minority veniremen from the jury. The prosecutor passed up opportunities to exclude minority members in the fifth and final rounds of jury selection. Cf. United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) ("The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury."). In addition, nothing in the prosecutor's questions or comments during jury selection in any way suggested an intent to discriminate. Nor did petitioner adduce any other facts to support an inference of discriminatory purpose. On comparable records, the courts of appeals have consistently held that such showings do not establish a prima facie case. 1/

1/ See, e.g., United States v. Moore, 895 F.2d 484, 486 (8th Cir. 1990) (government used four of six peremptory challenges to strike blacks, but three blacks sat on jury); United States v. Grandison, 885 F.2d 143 (4th Cir. 1989)

(continued...)

In any event, the purpose of the prima-facie-case standard is to determine whether the prosecutor must explain the reasons for exercising particular peremptory challenges. In this case, the prosecutor did so, and his explanations were clearly adequate under Batson. Cf. United States v. Clemmons, 892 F.2d 1153, 1156 (3d Cir. 1989) (holding that once the prosecutor provides his explanation, the reviewing court should consider it even if a prima facie case was not established), petition for cert. pending, No. 89-7003. The prosecutor's explanations were clear, specific, race-neutral, and related to the particular case to be tried. See Batson, 476 U.S. at 98 & n.20. Juror Clark, a candidate for jury foreman, was struck because of his youth and inexperience. The prosecutor indicated that he might not have struck this juror but for the prospect that he would become foreman. V Tr. 140-141. Courts have recognized that a juror's lack of worldly experience is a pertinent, and legitimate, reason for

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3/ (...continued)
(government used six of nine peremptory challenges to strike blacks, but two blacks sat on jury and three blacks served as alternates), cert. denied, No. 89-6673 (May 14, 1990); United States v. Rogers, 850 F.2d 435, 437 (8th Cir. 1988) (government used three of seven peremptory challenges to strike blacks; jury included two blacks and one black alternate); United States v. Dawn, 897 F.2d 1444, 1448 (8th Cir. 1990) (government used six of seven peremptory challenges to strike blacks, but jury included two blacks; holding that "numbers alone are not sufficient to establish or negate a prima facie case").

a peremptory challenge. 4/ Juror Garcia "lacked fluency in the English language," which caused the prosecutor strike him because this was "a case where we have to play tapes of people." V Tr. 141. The concern that a juror might not be able to comprehend tape recordings, which are often difficult to understand even for native speakers of English, is an entirely valid reason for exercising a peremptory strike, unrelated to racial grounds. Cf. United States v. Mathews, 803 F.2d 325, 330 (7th Cir. 1986) (juror struck due to her expressed reservations about her ability to understand tape-recorded evidence), reversed on other grounds, 485 U.S. 58 (1988); see also United States v. Rodriguez-Cardenas, 866 F.2d 391, 393 n.2 (11th Cir. 1989) (inarticulate juror), cert. denied, 110 S. Ct. 1110 (1990); United States v. Tucker, 773 F.2d 136, 142 (7th Cir. 1985) (same), cert. denied, 478 U.S. 1021 (1986).

Juror Callier troubled the prosecutor because "she had children the age of the defendant and might have undue sympathy for the defendant" for that reason. V Tr. 140. That is a valid basis for a challenge. United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (jurors or their spouses had jobs that may have caused them to identify with the defendant), cert. denied, 109 S. Ct. 1312 (1989); United

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4/ United States v. Mitchell, 886 F.2d 667, 671-672 & n.2 (4th Cir. 1989); United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), cert. denied, 110 S. Ct. 508 (1989); United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), cert. denied, 109 S. Ct. 97 (1988).

States v. Garrison, 849 F.2d 103, 105 (4th Cir.) (jurors' age similarity to defendant might have created sympathy for him), cert. denied, 109 S. Ct. 566 (1988); United States v. McCoy, 848 F.2d 743, 745 (6th Cir. 1988) (young and unemployed juror might have sympathized with defendant who was also young and unemployed). Finally, the prosecutor struck juror Brown as an alternate because she was a social worker. That was also a permissible reason for exercising a peremptory challenge. See United States v. Briscoe, 896 F.2d 1476, 1487-1488 (7th Cir. 1990) (youth supervisor at a juvenile penal center); United States v. Wilson, 867 F.2d 486, 487 (8th Cir.) (juvenile court social worker), cert. denied, 110 S. Ct. 92 (1989).

After presiding over jury selection and hearing the prosecutor's explanations, the magistrate found no intentional discrimination. The magistrate found "no pattern" suggestive of discrimination, pointing out that the government had challenged two white persons and that at least three minority members were chosen to serve on the jury. In addition, the magistrate detailed his views as to the validity of the prosecutor's exclusion of two of the minority jurors. As to juror Clark, the magistrate noted that the prosecutor's desire for "an older mature person with a long work history to judge the credibility in this particular case" was a "rational observation" with which "I have no quarrels[.]" As to juror Brown, the magistrate explained

that "it did not surprise me when the government challenged [her] based upon the fact that she is a social worker." 5/ Summing up, the magistrate stated that, "[i]n any event, in my view the government has explained itself in sufficient detail for me to make the following findings without hesitation. * * * [T]here is no pattern, there was not an intent to make or deprivation of a right to a jury trial by peers. I say that without hesitation for whatever it's worth in this particular case." V Tr. 152-153.

Those findings, amply supported by the record, establish that petitioner's rights under Batson were not violated in this case. In Batson, this Court made clear that:

> "[A] finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.

Id. at 98 n.21 (citation omitted). Consistent with that principle, the courts of appeals have applied the clearly erroneous standard in reviewing the determinations of a trial judge that intentional discrimination did not occur. See, e.g., United States v. Power, 881 F.2d 733, 739 (9th Cir. 1989); United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), cert. denied, 110 S. Ct. 508 (1989); United States v.

5/ The magistrate adverted to a notorious local incident in which a social worker had "balked at returning a verdict in a hijacking case," which had occasioned much discussion among prosecutors about the "wisdom or lack of wisdom about some social workers on the jury." V. Tr. 152-153.

Battle, 859 F.2d 56, 58 (8th Cir. 1988); United States v. Biaggi, 853 F.2d at 96; United States v. Clemons, 843 F.2d 741, 746-747 (3d Cir.), cert. denied, 109 S. Ct. 97 (1988). Applying that standard here, there is no basis for reversing the magistrate's finding that the prosecutor did not act with a discriminatory motive. Accordingly, the judgment of the court of appeals rejecting petitioner's Batson claim is correct.

2. Although petitioner's Batson claim lacks merit, we agree with petitioner that the court of appeals' analysis departed from the general approach to discrimination in jury selection that this Court marked out in Batson. The Court in Batson did not suggest that its equal protection analysis would be inapplicable to a case in which the defendant's jury mirrored the community, and in particular contained members of the defendant's ethnic group roughly proportional in numbers to the representation of that group in the community. Nonetheless, we submit that it is unnecessary for this Court to review the court of appeals' judgment in this case, for several reasons.

First, as we have discussed above, the judgment in this case is correct. The magistrate held that petitioner did not establish a case of racial discrimination in the prosecutor's use of peremptory strikes, and there is no basis for disturbing that conclusion.

Second, the court of appeals' decision was rendered

before this Court's decision in Holland v. Illinois, 110 S. Ct. 803 (1990), in which the Court ruled that the Sixth Amendment does not apply to peremptory strikes. That decision discredited earlier Second Circuit cases on which the court below heavily relied in this case. 6/

Because the appeal in this case was decided prior to Holland, the court of appeals acted in a legal context in which a conviction obtained in the absence of a proportionally representational jury would be reversed on Sixth Amendment grounds when discriminatory strikes have been employed; it then found that the "incremental benefit" of reversing a conviction obtained with a fairly representative jury on equal protection grounds was not warranted. Pet. App. C445. In the wake of Holland, however, it is clear that the Sixth Amendment does not supply a benchmark against which to measure the "incremental" furthering of Batson in cases involving fairly representative juries. Accordingly, the court of appeals may well feel it necessary to reconsider the rationale of this case in light of Holland. 7/

6/ The court of appeals supported the key elements in its holding by relying on its previous Sixth Amendment decisions in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 478 U.S. 1001 (1986), and Roman v. Abrams, supra.

7/ The court of appeals apparently does not regard itself as bound to apply the analysis employed in this case in all Batson-type cases in which the analysis might be invoked. In the only case in which the Second Circuit has cited the decision below or had occasion to decide whether to apply it, that court did not rely on the holding in this case to

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Third, while the Second Circuit's analysis was facially different from the analysis this Court prescribed in Batson, the factor that the court of appeals found dispositive in this case -- the representative composition of the jury -- would be an important factor under conventional Batson analysis in establishing that there was no prima facie case of discrimination in the prosecutor's exercise of peremptory challenges. As a result, few if any cases will come out differently under the two approaches. As we have indicated in our analysis of the case under the principles of Batson, this is certainly not a case that would be decided differently depending on which route the court took to its decision.

There are other reasons as well why few if any cases will be affected by the analysis employed by the court of appeals in this case. District courts have an obligation to remedy instances of intentional discrimination "on the spot, without waiting to see the ultimate composition of the jury."

1/ (...continued)
avoid reaching the merits of the defendant's Batson claim. Rather, the court squarely addressed the question whether Batson was violated; because the court found no violation, it concluded that there was no occasion to consider "whether the group alleged to have been impermissibly challenged is significantly underrepresented in the jury that convicted the appellant." United States v. Ruiz, 894 F.2d 501, 507 n.4 (2d Cir. 1990), quoting United States v. Alvarado, 891 F.2d 439, 445 (2d Cir. 1989). Accordingly, there is no indication that the court of appeals will routinely use its holding below to pretermit review of Batson claims on their merits, even in those relatively few cases to which the court's analysis below would theoretically be applicable.

Pet. App. C445. That responsibility is unaltered by the Second Circuit's rule, which applies only where the trial court has rejected a defendant's Batson claim.

Moreover, in cases in which a Batson claim is rejected at trial, review of that determination on appeal is conducted under a highly deferential standard. Batson, 476 U.S. at 98 n.21; see United States v. Moore, 895 F.2d 484, 486 (8th Cir. 1990). Consequently, the trial court's finding of fact that the prosecutor did not practice purposeful discrimination will generally be sustained on appeal absent a clear error on the trial court's part.

Furthermore, the rule at issue in this case could affect the outcome of the case only if enough minority members sat on the jury to approximate their percentage in the community. Although it is theoretically possible for a valid Batson claim to arise even though minority group members are proportionally represented on the jury, we believe it highly unlikely that many claims of discrimination will be substantiated when the prosecutor has accepted enough minority jurors to approximate their representation in the community. If a prosecutor is engaging in discrimination, he is likely to aim at excluding minorities to the greatest extent possible -- a goal that will probably preclude a representative number from being empaneled. On the other hand, a prosecutor who accepts minority members on the jury in about the same proportion as they are found in the

community at large is less likely to be engaged in tacit racial discrimination. For those reasons, we think that cases with facts to which the court of appeals' rule would be applicable will not occur with any frequency. The experience of the courts to date, in which few cases like the present one have been decided, supports that view.

In sum, the issue presented in this case is not of sufficient importance in the administration of criminal justice to warrant review by this Court at this time. No other court of appeals, to our knowledge, has faced a situation similar to that presented in this case. 8/ Nor has any other court of appeals so much as discussed the application of the principle fashioned by the Second Circuit here. 9/

8/ One intermediate state appellate court has applied a principle resembling that discussed by the court of appeals. State v. Vincent, 755 S.W.2d 400, 403 (Mo. App. 1988) (concluding that where all of the prosecutor's six challenges were used to exclude blacks, but five blacks served on the jury, the defendant lacked "standing to raise a Batson challenge"), cert. denied, 109 S. Ct. 3155 (1989). As petitioner notes in his supplemental brief, the New York Court of Appeals in People v. Jenkins, 1990 WL 34716 (Mar. 29, 1990) rejected a similar rule (reproduced at Pet. Supp. Br. App. A). We agree with petitioner that the rationale of Jenkins conflicts with that of the decision here. Based on the magistrate's findings, however, the result in this case is consistent with Jenkins.

9/ Contrary to petitioner's contention (Pet. 9), the holding below was not tantamount to a rule that a prima facie case of discrimination cannot be established if a representative number of members of the pertinent minority group sit on the jury. There is therefore no conflict between the decision in this case and those in cases discussing the effect of minority representation in the jury on the defendant's

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1990

9/ (...continued)
ability to establish a prima facie case of intentional discrimination in jury selection. The fair-cross-section inquiry looks only at two facts: the racial composition of the jury and the racial composition of the community. A rough equivalence between those two numbers does not defeat a showing of a prima facie case of discrimination, although a proportional representation of minority members on the jury may provide supportive evidence undercutting a prima facie case. See United States v. Biaggi, 673 F.Supp. 96, 106 (E.D.N.Y. 1987), aff'd, 853 F.2d 89 (2d Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989). It is well established that the question whether a prima facie case exists requires consideration of "all relevant circumstances," Batson, 476 U.S. at 96-97, not just a single factor such as the racial composition of the jury. The court of appeals here recognized that principle. Pet. App. C445.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by first class mail on May 21, 1990.

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